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IN THE

Supreme Court of the United States

October Term, 1977

No. 77- 1189

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE,

Petitioner,

v.

UNITED STATES OF AMERICA, *ET AL.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioner, The National Industrial Traffic League, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on December 29, 1977.[1]

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[1]Respondents to this Petition are United States of America, Interstate Commerce Commission, Middle Atlantic Conference, Rocky Mountain Motor Tariff Bureau, and Southern Motor Carriers Rate Conference, Ford Motor Company, Jones Transfer Company.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears at Appendix A, pp. 3a-11a. The Report and Order of the Interstate Commerce Commission decided May 12, 1976, served May 25, 1976, and reported at 124 M.C.C. 680 appears at Appendix B, pp. 15a-134a. The Report and Order of the Interstate Commerce Commission decided May 20, 1977, served June 3, 1977, and reported at 126 M.C.C. 803 appears at Appendix B, pp. 135a-164a. The Decision and Order of the Interstate Commerce Commission decided September 14, 1977 and served September 15, 1977 is unreported and appears at Appendix B, pp. 165a-172a.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on December 29, 1977 and this petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Third Circuit erroneously applied the standard of review announced by this Court in *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972), by construing that opinion to preclude the reviewing court from undertaking a careful scrutiny of the record to determine whether a rational basis exists for the agency decision and whether a rational connection can be found between the problems addressed and the remedies chosen?

2. Whether the Interstate Commerce Commission acted arbitrarily and capriciously in: (1) curtailing the use of

holding yards in the face of evidence demonstrating that holding yards are economical, efficient, and consistent with the purposes of the uniform detention rules; (2) shifting the burden of proving the cause of delay from the carrier to the shipper in light of the fact that such a shift is inconsistent with the nature and purpose of detention; and (3) establishing a uniform nationwide detention charge without making any attempt to determine whether the level of the charges established was proper in light of the purposes which they were intended to serve.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 5:

§706. Scope of review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Code of Federal Regulations, Title 49:

§1307.35(e)(1) (Proposed)
Section 1(b)

This item applies only when vehicles are delayed or detained at the premises of pickup or delivery and only when such delay or detention is not attributable to the carrier.

Section 5. Charges

When the delay per vehicle beyond free time is 1 hour or less the charge will be $18. For each additional 30 minutes or fraction thereof, the charge will be $9.

§1307.35(e)(2) (Proposed)
Section 2(f)

'Spotting' means the placing of a trailer at a specific site designated by consignor, consignee, or other party designated by them, detaching the trailer, and leaving the trailer in full possession of consignor, consignee, or other designated party unattended by carrier's employee and unaccompanied by power unit. Carrier will not move

the trailer until such time as it has received notification, pursuant to section 3, that the trailer is ready for pickup at any site on premises. Consignor, consignee, or other designated party may shift the spotted trailer with its own power units at its own expense and risk for the purpose of loading or unloading. Empty trailers placed at the premises of consignor without specific request are not spotted until the carrier receives a consignor's request and places a trailer for spotting. Movement of the trailer from the consignor's premises to the specific site for spotting shall be the obligation of the carrier, and free time shall accrue as provided in section 3.

STATEMENT OF THE CASE

On June 22, 1973 the Interstate Commerce Commission instituted a rulemaking proceeding, Ex Parte No. MC-88, for the purpose of considering the promulgation of uniform, nationwide detention rules and charges designed to alleviate the problems encountered under the existing system. On May 12, 1976 the Commission issued its first Report and Order in that proceeding. Appendix B, p. 16a-*et seq*. The Commission determined that uniform detention rules were desireable and promulgated rules to govern detention both with and without power units.

The regulations promulgated in that Report and Order were the subject of numerous petitions for reconsideration challenging, *inter alia*, the failure of the Commission to cost justify the uniform level of detention charges established by the Commission, the shift in the burden of proving the cause of delay of carrier equipment from the carrier to the shipper, and the curtailment of the carrier's linehaul obligation to provide delivery to the shipper's loading and unloading facilities in those instances where holding yards are used. In response to these petitions for reconsideration,

the Commission issued a Report and Order On Reconsideration on May 20, 1977.[2] The Commission declined to alter its position with respect to the need to cost justify the level of detention charges and the burden of proving the cause of delay. It modified its position with respect to holding yards to a limited extent to permit their use in what it termed "origin detention", but declined to alter its position with respect to "destination detention."

A second round of petitions seeking modification of the Commission's orders was filed by affected shippers and carriers. Again, the Commission refused to alter its position with respect to the three key issues referred to above.[3]

Appeals challenging the Commission's Reports and Orders in the three areas just discussed were filed with the United States Court of Appeals for the Third Circuit by a group of carriers,[4] a shipper,[5] and a shipper association.[6] The jurisdiction of the court was invoked pursuant to 28 U.S.C. §§2321 and 2343. The effective date of the Commission's orders in Ex Parte No. MC-88 was stayed by order of the United States Court of Appeals for the Third Circuit pending judicial review.[7]

The Third Circuit affirmed the Commission's decision and orders, placing almost total reliance on what it perceived to be the severely limited scope of review mandated

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[2]Appendix B, pp. 135a *et seq.*

[3]Appendix B, pp. 165a-173a.

[4]Jones Transfer Company, Central Transport, Inc., Earl C. Smith, Inc., Inter-City Trucking Service, Inc., Ogden & Moffett Company, U.S. Truck Company, Inc., and White Star Trucking, Inc.

[5]Ford Motor Company

[6]The National Industrial Traffic League.

[7]Order served September 2, 1977.

by this Court's decision in *United States v. Allegheny-Ludlum Steel Corp., supra.* The court characterized the Interstate Commerce Commission's discussion of some of the points raised by the petitioners as "at best, laconic." Nevertheless, the court found that under the appropriate scope of review the Commission's decision was "rationally supported."

By Order entered January 18, 1978 the Court of Appeals stayed the issuance of its mandate for thirty days pending application for writ of certiorari.

To understand the issues which are presented by this case it is necessary to understand the nature and purpose of detention charges and the practices which have developed with respect to detention.

For years, shippers have been required to pay a charge for the delay of motor carrier equipment at the point of origin or destination. The charge, known as detention, was considered to have a dual nature. It included an element of compensation to reimburse the carrier for the use of its equipment and a penalty element to serve as an inducement to the shipper to release carrier equipment promptly. Detention is charged only after the expiration of a reasonable "free time" period, during which the shipper should have been able to load or unload the carrier's trailer under normal circumstances.

From its inception, detention has been governed by rules and regulations which varied from territory to territory and the level of the charge has likewise varied. The plethora of detention rules resulted in considerable confusion and led to considerable difficulty in enforcement.

The level of the detention charge assessed has been recognized by the Commission to be very important to its overall purpose.[8] Since detention is intended to compensate

[8]Appendix B, pp. 52a-53a.

the carrier for the use of its equipment, it is clear that the charge must at least cover carrier costs. In addition, the penal element of the charge must be sufficiently high so as to provide an incentive to the shipper to release the equipment, without at the same time becoming a source of revenue to the carrier. The Commission has recognized that a delicate balancing of goals and interests is necessary to the establishment of a proper level of detention charges.[9]

In spite of the importance of the level of the charges, no attempt has ever been made to cost justify existing detention charges or, until the Ex Parte No. MC-88 proceeding, to establish a uniform nationwide level of charges. As a result, the current charges range from $12/hour to $20.30/hour. In Ex Parte No. MC-88, the Interstate Commerce Commission established a uniform charge of $18/hour, which also has not been cost justified.[10]

Detention is assessed with the intent of inducing shippers to release carrier equipment promptly. Thus, it is reasonable to assume that detention should be assessed against a shipper only when the cause of the delay is within the shipper's control. This fact has been recognized in the existing detention rules in provisions which state that detention will be asssessed only when delay is attributable to the consignor or consignee. In Ex Parte No. MC-88, the Commission shifted the burden of proving the cause of delay to the shipper by providing that the detention rules apply only when delay is not attributable to the carrier.[11]

A carrier practice which is at least tangentially related to detention is the use of "holding yards" or "trailer pools." Holding yards have been in use by shippers and carriers since the early 1950's. Holding yards are maintained by

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[9]Appendix B, p. 53a.

[10]Appendix B, p. 138a.

[11]Appendix B, p. 155a.

shippers in the vicinity of their plants for the purpose of permitting motor carriers to drop both empty and loaded trailers awaiting movement to the shipper's dock for loading or unloading.

Holding yards are utilized by carriers at both origin and destination. At origin, holding yards permit a carrier to drop empty trailers whenever it is convenient to do so. Rather than returning to a more distant terminal to await the next shipment, the carrier may drop the trailer at a nearby holding yard. When a shipper orders a trailer for placement, the carrier may conveniently do so without traveling the distance between its terminal and the shipper facility. Carriers may, and frequently do, use one shipper's holding yard to serve other shippers in the vicinity. Holding yards have been especially important in the operations of irregular route carriers which normally do not maintain numerous terminals. Holding yards have made it possible for irregular route carriers to compete effectively with regular route carriers in areas where the regular route carrier would normally have the advantage because of the proximity of its terminals.

Holding yards have also proved to be beneficial to shippers since empty equipment can be made available by the carrier on relatively short notice.

Because the carrier will often place empty trailers in the holding yard without request from or notice to the shipper, the free time period prior to the assessment of detention charges does not begin to run immediately. Free time will begin to run only when the shipper notifies the carrier that it wants the trailer placed for loading.

At destination, holding yard operations differ somewhat from those just described. At destination, loaded trailers are placed in the holding yard until they can be accommodated at the shipper's unloading facility. In contrast to the practice at origin, free time on loaded trailers at

destination begins to run as soon as the shipper receives notification that the trailer has been dropped in the holding yard. This prevents the shipper from using carrier equipment for warehousing of shipments which the shipper is not yet ready to receive.[12]

Holding yards at destination permit the carrier to release its tractors almost immediately upon arrival. The alternative would be for the carrier to keep both tractor and trailer on the site until delivery can be effected. This alternative would tie up expensive carrier equipment unnecessarily and, in many cases, without compensation since the carrier receives no payment for the use of its equipment during the free time period.

At both origin and destination the movement between holding yard and dock has generally been considered to be part of the carrier's linehaul obligation to provide complete service, including one pick-up and one delivery. When placement or removal of a trailer is required, the carrier is contacted to provide the service. In many instances, especially in large holding yards, the carriers employ a common agent to perform the switching service for all of them. This practice saves them the time and expense of dispatching over-the-road equipment from the terminal.

In Ex Parte No. MC-88, the Interstate Commerce Commission eventually, after the filing of numerous petitions for reconsideration on behalf of both shippers and carriers, recognized the economies and efficiencies flowing from the use of holding yards at origin.[13] However, it refused to recognize the existence of these same economies and efficiencies at destination and defined "spotting" in terms

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[12]This is a fact which the Commission apparently has never fully grasped, as illustrated by its September 15 Order. Appendix B, p. 160a.

[13]Appendix B, p. 142a.

which effectively precluded the continuing use of holding yards at destination. Under the Commission's new definition of spotting, the carrier's linehaul obligation is considered to end when the loaded trailer is dropped in the holding yard. This places the responsibility for the movement between holding yard and dock on the shipper rather than on the carrier, where it has traditionally rested.

REASONS FOR GRANTING THE WRIT

This case raises fundamental questions concerning the scope of judicial review of administrative agency decisions under the "arbitrary and capricious" standard of section 706 of the Administrative Procedure Act, 5 U.S.C. §706(2)(A), and the proper interpretation of the Supreme Court's opinion in *United States v. Allegheny-Ludlum Steel Corp., supra.*

The Court of Appeals Has Applied An Unduly Restricted Scope Of Review

The decision of the Court of Appeals affirming the decision of the Interstate Commerce Commission consists of little more than a recitation of the facts and the positions of the parties, as well as a lengthy excerpt from this Court's opinion in *United States v. Allegheny-Ludlum Steel Corp., supra.* See Appendix A hereto. The court concluded its opinion with the following pertinent comments:

> Were we able to utilize a more expansive notion of what is 'arbitrary, capricious, and an abuse of discretion,' we might have been receptive to some of the arguments presented by the petitioners. (citation omitted). For it can be said with some confidence that the I.C.C.'s discussion of

> some of the points raised by the petitioners was, at best, laconic.[14]

It is obvious from the foregoing that the court felt that there were definite shortcomings in the Commission's Reports and Orders in Ex Parte No. MC-88. But, because of the very restrictive interpretation which it placed on this Court's opinion in *United States v. Allegheny-Ludlum Steel Corp., supra,* the court declined to engage in the careful scrutiny of the record which is required under section 706 of the Administrative Procedure Act, 5 U.S.C. §706. The position taken by the Third Circuit with respect to the appropriate scope of review is inconsistent with the decision of this Court in the *Allegheny-Ludlum* case and should not be permitted to stand as precedent in interpreting and applying that decision.

As the court noted, it was not writing on a clean slate in construing the standard of review to be applied in cases seeking review of agency decisions arising from informal rulemaking proceedings. The scope of review under the "arbitrary and capricious" standard has been the subject of considerable judicial comment, including several leading decisions by this Court. See *Citizens To Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971); *Bowman Trans. v. Arkansas-Best Freight,* 419 U.S. 281 (1974). Throughout the decisions interpreting and applying the arbitrary and capricious standard, it has been recognized that the ultimate scope of review is a narrow one which requires a considerable degree of deference to the administrative agency. *Bowman Trans. v. Arkansas-Best Freight, supra* at 285. However, it has also been recognized that the limitations on the scope of review neither require nor permit the reviewing court to refrain from making a "search-

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[14] Appendix A, p. 10a.

ing and careful" inquiry into facts. *Citizens To Preserve Overton Park v. Volpe, supra* at 416.

The obligation of the reviewing court under the Administrative Procedure Act is to determine whether the agency has supplied a rational basis for its order; i.e., "whether it demonstrably has given reasoned consideration to the issues, and has reached a result which rationally flows from its conclusions." *National Association Of Food Chains, Inc. v. I.C.C.*, 535 F.2d 1308, 1315 (D.C. Cir. 1976). The reviewing court must determine whether there was a "rational connection between the facts found and the choice made." *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).

To determine whether the requisite rational basis and connection exist, it has been found necessary to examine the premise from which the agency began its inquiry, the facts which it elicited during the course of the rulemaking proceeding and the conclusions which the agency reached with respect to the issues presented. *City Of Chicago, Illinois v. Federal Power Commission*, 458 F.2d 731 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1079. In order to accomplish this task, the reviewing courts have recognized the necessity of an in-depth scrutiny of the record. *South Terminal Corp. v. Environmental Protection Agcy.*, 504 F.2d 646 (1st Cir. 1974); *State of Texas v. E.P.A.*, 499 F.2d 289 (5th Cir. 1974).

As the United States Court of Appeals for the District of Columbia Circuit recognized in *Ethyl Corp. v. Environmental Protection Agcy.*, 541 F.2d 1, 36 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941, there is no inconsistency between the narrow scope of review mandated by section 706 and the in-depth scrutiny which the courts have found necessary to fulfill their obligations:

> There is no inconsistency between the deferential standard of review and the requirement that the

> reviewing court involve itself in even the most complex evidentiary matters; rather, the two indicia of arbitrary and capricious review stand in careful balance. The close scrutiny of the evidence is intended to educate the court. It must understand enough about the problem confronting the agency to comprehend the meaning of the evidence relied upon and the evidence discarded; the questions addressed by the agency and those bypassed; the choices open to the agency and those made.

The alternative to the above approach is to permit the courts to become a "rubber stamp" for administrative agencies, a result which would "render the appellate process a superfluous (although time-consuming) ritual." *Id* at 34.

The decision of the Third Circuit stands in sharp contrast to the foregoing principles of review. In applying the *Allegheny-Ludlum* standard, the Third Circuit has so restrictively interpreted the scope of review that is has virtually nullified the judicial role in the reviewing process. Compare, *B.F. Goodrich Co.* v. *Department of Trans.*, 541 F.2d 1178 (6th Cir. 1976); *Ala. Ass'n. of Ins. A.* v. *Bd. of Gov. of F.R. System*, 533 F.2d 224 (5th Cir. 1976); *South Terminal Corp.* v. *Environmental Protection Agcy., supra.* That such a restrictive reading of that decision is not justified is readily apparent from this Court's opinion in *Allegheny-Ludlum.* That opinion indicates that this Court took a close look at the evidence before the Commission relating to the existence of car shortages and remedies chosen by the Commission to solve that problem.[15] Only after this "careful and searching" inquiry did the Court conclude that there was a

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[15]406 U.S. 742, 749-756.

"sufficient relationship between the Commission's conclusions and the factual bases in the record."[16]

A reading of the court's opinion below reveals that it made no attempt to engage in the type of scrutiny which is necessary in order to perform properly the judicial role in reviewing agency decisions which are the product of informal rulemaking. The court's opinion indicates that its only reason for refraining from making a "searching and careful inquiry into the facts was the limited role which it was permitted to play in light of *United States* v. *Allegheny-Ludlum Corp.*[17]

Informal rulemaking, subject to review under section 706 of the Administrative Procedure Act, 5 U.S.C. §706, is playing a major role in the administrative process. Decisions such as that of the Third Circuit in this case represent an abdication of the judicial function in reviewing such agency actions. The Third Circuit's opinion is a classic example of judicial deference being allowed to "slip into a judicial inertia."[18] Such a restrictive reading of the *Allegheny-Ludlum* decision should not be permitted to stand.

The Commission's Decision Is Arbitrary, Capricious And An Abuse Of Its Discretion

Had the Court of Appeals engaged in the type of careful scrutiny which is contemplated by section 706 of the Administrative Procedure Act, 5 U.S.C. §706, it would have discovered that the Commission's decision was arbitary and capricious in all three of the aspects challenged by petitioners in the proceeding below.

In establishing a uniform level of detention charges without reference to carrier costs or to the penalty element involved, the Commission totally ignored even its own ad-

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[16] 406 U.S. 742, 755-756.

[17] Appendix A, p. 10a.

[18] *Volkwagenwerk Aktiengesellchaft v. FMC*, 390 U.S. 216 (1968).

monition that a "delicate balancing" is necessary to the establishment of a proper level of detention charges.[19] The commission expressly refused to examine carrier costs in determining the appropriate charge, citing as the basis for its refusal the "key penal nature" of detention.[20] The commission's decision on this issue completely ignores earlier pronouncements in the same proceeding regarding the dual penalty-compensation nature of detention charges and the need to establish a level of charges sufficiently high to cover costs without at the same time providing an undue profit to the carrier.[21]

There is no way to determine whether a proposed level of detention charges is adequate to cover carrier costs unless those costs have been developed and analyzed. Further, without complete information concerning carrier costs, it is not possible to determine the level of penalty element included in the detention charges. Because the level of the penalty element is unknown, it is not possible to determine whether the detention charge is serving its intended purpose, i.e. providing an incentive to shippers without at the same time providing undue profits to the carriers.

The $18/hour charge established by the Commission was justified as the proper level of detention on the ground that it was within the range of existing detention charges.[22] The absurdity of this justification is very apparent in light of the great lengths to which the Commission went to establish that the existing detention charges bore no relation to carrier costs.[23]

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[19] Appendix B, p. 53a.
[20] Appendix B, p. 138a.
[21] Appendix B, pp. 52a-53a.
[22] Appendix B, p. 53a.
[23] Appendix B, pp. 53a-58a.

In short, there is absolutely no basis on the record for the level of detention charges established by the Commission. From the record it is impossible to determine: (1) whether the charge is sufficient to cover carrier costs, (2) whether there is a sufficient penalty element to serve as an inducement to shippers to release carrier equipment and (3) whether the charge is so high as to produce undue profits for the carriers. For these reasons, the Commission's decision was arbitrary and capricious within the meaning of section 706 of the Administrative Procedure Act, 5 U.S.C. §706.

Similarly, the Commission's action in shifting the burden of proving the cause of delay is without rational basis. Rather than making the shipper bear responsibility for only those delays which it causes, the rule adopted by the Commission imposes responsibility on the shipper for all delays which are not specifically attributable to the carrier. In effect, the shipper is required to pay not only for the delays which it causes, but also for any delays which are beyond the control of both the shipper and the carrier. The Commission concedes as much in its Report and Order On Reconsideration.[24]

The commission's position in this regard is totally inconsistent with the nature and purpose of detention charges. The Commission has repeatedly stated that detention is not designed to provide a source of revenue for carriers, but rather, to discourage undue delay of motor carrier equipment by shippers and their representatives.[25] Detention charges will serve this purpose only if it is possible for the shipper to act to reduce or eliminate delay of carrier equipment. It is obvious that no incentive, regardless of how burdensome, can prompt a shipper to take action to eliminate a cause of delay which is beyond its control.

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[24] Appendix B, pp. 145a-146a.

[25] Appendix B, p. 52a.

Delay in releasing motor carrier equipment may be attributable to a variety of causes and sources. Detention is directed toward only one of those sources, the shipper. To the extent that a shipper is forced to pay detention for delays which are not attributable to it, it is providing a source of revenue rather than paying a penalty. This is inconsistent with the nature and purpose of detention. No rational basis has been presented by the agency for this departure from existing principles governing responsibilty for detention charges.

Finally, the Commission acted arbitrarily and capriciously in promulgating a definition of spotting which terminates the carriers' linehaul obligation with respect to loaded trailers at the time they are temporarily placed in a holding yard.[26] The Commission's action in this regard was inconsistent with the purpose of the rulemaking proceeding, i.e. to reduce undue delay and inefficient utilization of carrier equipment. Further, the stated basis for the Commission's action, preferential treatment accorded to large shippers, is totally without support in the record.

The evidence before the Commission, submitted by both shipper and carrier parties to the proceeding, established beyond doubt that holding yards were the most efficient and economical means of effecting delivery. Holding yards permit carriers to release expensive over-the-road equipment almost immediately upon arrival at destination. The alternative, so-called "live delivery," would require carriers to allow tractors and drivers to remain idle pending unloading of the trailers. For much of this idle time, the carrier would receive no compensation due to the "free time" period allowed on all shipments.[27]

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[26] Appendix B, p. 159a.

[27] Free time varies from 2 to 7 hours depending on the size of the shipment. Appendix B, p. 157a.

The commission itself characterized trailer pooling as a "beneficial practice,"[28] but then proceeded to adopt regulations which effectively precluded its continuing use. The Commission's stated reason for choosing to ignore the efficiencies and economies inherent in trailer pool operations was the fact "that the convenient holding yard arrangement advocated by petitioners allows large shippers the advantage of unlimited spotting with little or no likelihood of incurring any detention charges."[29] The foregoing statement is contrary to fact and inconsistent with the evidence before the Commission. Free time on loaded trailers left at holding yards begins to run as soon as the trailer is dropped. There is no way that the holding yard operation can be used to avoid detention charges.

It was apparently in reliance upon the same false premise, i.e. that holding yards could be used as a device to evade detention charges, that the commission concluded that holding yards were unduly preferential to large shippers. For reasons which are not apparent from the record, the Commission concluded that carrier utilization of holding yards was merely a concession to large shippers. While Ex Parte No. MC-88 was instituted to examine numerous alleged abuses of the existing detention rules, there was no evidence developed on the record that the use of trailer pools gave rise to any of the alleged abuses. Further, any discrimination which might possibly arise from the ability of some shippers utilizing holding yards to arrange delivery has been offset by the availability to all shippers of the mandatory prearranged scheduling requirements imposed in the Ex Parte No. MC-88 proceeding.[30]

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[28] Appendix B, p. 142a.

[29] Appendix B, p. 168a.

[30] Appendix B, p. 156a.

The basic premise for the Commission's action is false and without basis in the record. Operating from such a premise, any action taken by the Commission can only be considered to be arbitrary and capricious. As the court stated in *City of Chicago, Illinois* v. *Federal Power Commission, supra* at 742, "A regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." Here, the problem did not exist. Therefore, the remedy chosen can only be considered capricious.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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